BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BERTHA M. PEREZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,017,799
HALLMARK CARDS, INC.	)	
Self-Insured Respondent	)	

ORDER

Respondent appeals the January 30, 2009, Award of Administrative Law Judge Rebecca A. Sanders (ALJ). Claimant was awarded a 25 percent functional impairment to claimant's left upper extremity at the shoulder level and a 25 percent functional impairment to claimant's right upper extremity at the level of the shoulder after the ALJ determined that claimant had suffered accidental injuries to her shoulders which arose out of and in the course of her employment with respondent.

Claimant appeared by her attorney, George H. Pearson of Topeka, Kansas. Respondent appeared by its attorney, John D. Jurcyk of Roeland Park, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The record listed by the ALJ included not only the preliminary hearing transcripts, but also the exhibits attached to those transcripts. K.A.R. 51-3-5a restricts the consideration of medical reports admitted at a preliminary hearing to only the preliminary hearing unless stipulated to by the parties or unless the testimony of the physician, surgeon or other person making the report supports the report by testimony. At oral argument to the Board, the parties stipulated to the inclusion of not only the preliminary hearing transcripts, but also the exhibits attached to those transcripts. Therefore, the Board will consider not only the transcripts of the preliminary hearings, but also the exhibits attached. The Board heard oral argument on June 3, 2009.

ISSUES

1. Did claimant suffer accidental injuries to her shoulders on the dates alleged?

2. Did those injuries arise out of and in the course of claimant's employment with respondent? Respondent contends claimant's shoulder complaints occurred as the result of the natural aging process or the normal activities of day-to-day living. Claimant contends the physical requirements of her job with respondent caused or aggravated her shoulder conditions and caused or led to the need for surgery.

3. What is the nature and extent of claimant's disability? Respondent argues that the impairment ratings and opinions of board certified internal medicine specialist Chris D. Fevurly, M.D., are the most credible, while claimant contends the ALJ's finding that the opinions of board certified orthopedic surgeon Edward J. Prostic, M.D., were the most credible is appropriate and should be affirmed.

FINDINGS OF FACT

Claimant had worked for respondent for 27 years, with the last nine years being on the webtron printing press. As a webtron operator, claimant would gather card stock from the printer and load it into boxes, placing from 2000 to 3000 items into each box. This job required claimant to work at a level even with her shoulders and below. At times, claimant would have to obtain empty boxes from a stack starting higher than her shoulders, but this was rare. Occasionally, claimant would be borrowed to work on the cardboard fold job. This alternate job required that claimant obtain card stock. The card stock stacks were stacked over claimant's head and as the day progressed, slowly lowered to the level of claimant's waist. Both jobs were viewed as being repetitive.

In January 2003, claimant began having problems with her arms and shoulders. By April 15, 2004, claimant was unable to lift her left arm. Claimant went to her primary care doctor, Dr. Goering, and was later referred to Donald Mead, M.D., at St. Francis Health Care Center. Dr. Mead referred claimant for an MRI, which indicated that claimant had a torn rotator cuff in her left shoulder. Claimant was then referred to board certified orthopedic surgeon Craig L. Vosburgh, M.D., for an evaluation. Dr. Vosburgh agreed with the diagnosis of a torn rotator cuff in claimant's left shoulder, and surgery was performed on the shoulder on June 25, 2004. There was evidence of a torn rotator cuff in claimant's right shoulder as well, but no surgery was performed on that shoulder.

Claimant's last day of work with respondent was June 23, 2004, just prior to the left shoulder surgery. Her actual retirement from respondent occurred on December 31, 2004.

Claimant was referred by respondent to Dr. Fevurly for an evaluation on June 15, 2004, and a second time on December 17, 2008. At the first evaluation, Dr. Fevurly

diagnosed claimant with rotator cuff tendonopathy in the left shoulder and probably in the right shoulder. He opined that claimant's jobs with respondent did not play a significant role in the development of claimant's rotator cuff problems. He determined that the development of the rotator cuff problems were a natural consequence of living and claimant's age and body mass index, indicating that claimant stood 4 foot 11 inches and weighed 195 pounds. Dr. Fevurly acknowledged that prolonged or repetitive overhead work or forceful overhead work would exacerbate symptoms of rotator cuff tendonopathy. He agreed that, over time, rotator cuffs will thin and overhead tasks are known to be a risk factor for the development of rotator cuff tendonopathy. When shown a photograph of claimant standing at the cardboard fold machine and the stacks of card stock next to the machine,[1] Dr. Fevurly agreed that the repetitive overhead work depicted in that photograph could increase claimant's symptoms. He was not able to state whether the amount of repetitive overhead work being performed by claimant was sufficient to cause or contribute to claimant's rotator cuff tendonopathy. Utilizing the fourth edition of the AMA *Guides*,[2] Dr. Fevurly rated claimant at 14 percent to each upper extremity.

Claimant was referred by her attorney to Dr. Prostic for an evaluation on December 12, 2005, and again on December 18, 2007. Dr. Prostic diagnosed claimant with torn rotator cuffs bilaterally with the left shoulder being post surgical repair. He recommended that claimant obtain an MRI of the right shoulder and seek treatment for that shoulder as well. After examining claimant, Dr. Prostic determined that the overhead reaching was a primary cause of claimant's shoulder problems. Dr. Prostic rated claimant at 25 percent to each upper extremity, based on the fourth edition of the AMA *Guides.*[3] He stated that the *Guides'* ratings are inclusive of the shoulder itself. Claimant told Dr. Prostic that she performed repetitive overhead work. Respondent argues that claimant's description of her work duties greatly exaggerates her actual daily work duties.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[4]

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[1] Fevurly Depo, Ex. 3.

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[3] AMA *Guides* (4th ed.).

[4] K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[5]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[6]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[7]

K.S.A. 44-508(e) states:

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.[8]

Claimant's shoulder complaints began in January 2003, while she was working the webtron machine. Additionally, when claimant was borrowed to work on the cardboard fold job, the overhead activities increased her shoulder problems. Dr. Prostic determined that the jobs claimant performed for respondent were an aggravating factor in the development of her shoulder problems. While the Board acknowledges the history and job descriptions

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[5] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[6] K.S.A. 44-501(a).

[7] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[8] K.S.A. 44-508(e).

provided to Dr. Prostic were somewhat exaggerated, nevertheless, the duties on the two jobs did affect claimant's shoulders. Additionally, even Dr. Fevurly, respondent's expert, had to acknowledge that repetitive overhead work could exacerbate rotator cuff tendonopathy. The Board has also had the opportunity to view both the videotape of the webtron machine[9] and the cardboard fold photograph and finds the activities of the two were sufficient to aggravate claimant's shoulder problems. This record does not support respondent's position that claimant's injuries are the result of the natural aging process or the normal activities of day-to-day living. The repetitive work performed by claimant for respondent would rarely, if ever, occur during a person's "normal day".

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[10]

The Board finds that claimant did suffer accidental injuries to her shoulders while working for respondent and these injuries arose out of and in the course of her employment with respondent.

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[11]

K.S.A. 44-510c(a)(2) states:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all

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[9] P.H. Trans. (Sept. 15, 2004), Resp. Ex. 2.

[10] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[11] K.S.A. 44-510e(a).

> other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.[12]

Claimant was awarded functional disability awards for each upper extremity at the level of the shoulder. None of the physicians who testified in this matter were asked whether claimant was permanently and totally disabled. In fact, at oral argument neither party had even considered that issue, nor is there an indication that the ALJ considered that issue within the Award. It is even more troublesome that neither the ALJ nor either of the attorneys cited or considered *Casco*[13] in this action.

In *Casco*, the Kansas Supreme Court determined the appropriate method of calculating bilateral injuries, an issue which up until that point had been well settled. Before *Casco*, bilateral or parallel injuries resulting in permanent impairment were compensated as a whole body impairment. But the Court in *Casco* concluded that the longstanding analysis was wrong. From that point forward, the analysis for bilateral injuries changed. The *Casco* Court stated:

> Scheduled injuries are the general rule and nonscheduled injures are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.[14]
>
> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.[15]
>
> When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the

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[12] K.S.A. 44-510c(a)(2).

[13] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

[14] *Id.* at Syl. ¶ 7.

[15] *Id.* at Syl. ¶ 8.

> claimant's award must be calculated as a permanent partial disability in accordance with K.S.A. 44-510d.[16]

Here, for whatever reason, neither the parties nor the ALJ considered the presumption of permanent total disability as announced in *Casco*. Based on this record, claimant has met the criteria to establish a prima facie case of permanent total disability under K.S.A. 44-510c, as both of her shoulders have suffered permanent impairment. Under *Casco*, this gives rise to the presumption of permanent total disability.

Perhaps claimant, on advice of counsel, is not seeking an award of permanent total disability. But the record is not clear. Arguably, the parties ought to be bound by their counsels' failure to fully address the issues present in this case, but doing so creates a significant issue for the Board. If claimant did not intend to waive her claim to permanent total disability, and claimant's recovery is limited to separately scheduled injuries, then the intent of the Workers Compensation Act and the analysis set forth by the Supreme Court has been thwarted. This approach would require the Board to ignore the provisions of a statute and the decision of the Supreme Court. But if the Board employs the *Casco* analysis, then it has unilaterally brought up an issue that had not been contemplated by either party or the ALJ. The unfairness of that is most particularly borne by respondent, who might have offered evidence in an attempt to rebut the presumption imposed by the statute. There is no indication herein as to what the ALJ's position would have been on that issue.

In light of these concerns, the Board finds that, in the interests of justice,[17] the Award in this matter should be set aside and remanded to the ALJ, who is directed to reopen the record and allow the parties the opportunity to fully consider and address the implications of K.S.A. 44-510c and *Casco*.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be set aside and the matter remanded to the ALJ for further proceedings consistent with the Order set forth above.

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[16] *Id.* at Syl. ¶ 9.

[17] *Neal v. Hy-Vee, Inc.*, 277 Kan, 1, 81 P.3d 425 (2003).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Rebecca A. Sanders dated January 30, 2009, should be, and is hereby, set aside and the matter remanded to the Administrative Law Judge for a determination of whether claimant is seeking an award of permanent total disability, and if so, further proceedings consistent with the Board's Order as set forth above.

IT IS SO ORDERED.

Dated this ____ day of July, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent
Rebecca A. Sanders, Administrative Law Judge